No. 3073

United States Circuit Court of Appeals

for the Ninth Circuit

CHARLES P. DOE, Claimant of the Steamship "GEORGE W. ELDER," Her Engines, etc.,

Appellant,

vs.

COLUMBIA CONTRACT COMPANY, a Corporation, and UNITED STATES FIDELITY and GUARANTY COMPANY, Stipulators,

Appellees.

Brief of Appellant

H. W. GLENSOR, ERNEST G. CLEWE, SANDERSON REED,
Proctors for Appellant.

IRA A. CAMPBELL, C. E. S. WOOD and ERSKINE WOOD,
Proctors for Appellees.

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STATEMENT.

This suit was brought by the owners of the Kern against the Elder for damages claimed to have been caused by the Elder in collision with the Kern on the Columbia River on the night of August 18, 1909.

Approximately opposite the Waterford light on the Columbia River the river is in the neighborhood of a mile in width, with plenty of water.

About midnight of August 18, 1909, the Steamer Kern was making fast to a tow in the fairway.

The Kern was 153 feet long (p. 30). The tow consisted of three barges, each 142 to 180 feet long. (p. 30; p. 448) These barges were fast to each other, side by side, the center one projecting its bow some distance beyond the bows of both of the barges on each side.

The barges were adrift. Each carried about 1000 tons of rock for the Columbia River jetty and of the sizes and for that purpose, (p. 125), making about 3000 tons in all.

The barges had been turned adrift by another steamer belonging to libelant in order that the Kern might tow them to the jetty. The Kern was endeavoring to make fast to these barges by inserting its bow against the stern of the center barge, leaving a barge fitting backward on each side of the bow of the Kern. Thus attached, the Kern was to push the barges ahead of her. The Kern was backing and filling at the time. (Test. of Jensen, Asst. Eng. on the Kern, p. 241.) The Kern had a line out to what we understand to be the down-stream barge,—(it is called in the testimony the "port" barge), and was endeavoring to reach a position where she could insert her bow in the space provided by the arrangement of the scows in order to make fast and proceed with her business. There was a slack in the line of some feet, the decree says five or thereabouts. Adding the length of the Kern, 153 feet, the minimum length

of the barge, 142 feet, say 20 feet for the extension of the center barge, gives a total length of 315 feet, covering the space occupied by the Kern and the barges. Taking the testimony of Anderson would add a few feet, say 40 feet more to the barges. The Kern and the barges can then fairly be said to have occupied from 300 to 365 feet total space. There was no lookout on the Kern. All hands were on the main deck and the barges looking forward making fast to the barges except Capt. Moran. There is no evidence to the contrary. She carried a crew as follows: Captain Moran, Pilot; a Master, Captain Copeland; a mate, a chief and an assistant engineer and four sailors (p. 173).

* * * * * * * *

The Kern was in charge of Captain Moran. He was in the pilot house of the Kern, when he heard the Elder's first whistle, and there was no lookout. The Kern is not a river boat. She was once the Lighthouse tender Manzanita. The Kern was lying up and down stream previous to the collision, her sidelights invisible to the Elder, but at the time of the collision had put herself more or less crosswise about in line with the direction of the barges.

While she was in this position she came into collision with the Elder on her way from Portland to Astoria.

The Elder was a passenger ship on her regular run from Portland to San Francisco. She had just rounded or passed Cooper's Point on a course

as her pilot testifies (see the Opinion) of half a point to the starboard of the Kern. The Kern's presence in the river below had been discovered at that time and the pilot endeavored to bear off the Washington shore some four hundred feet, which would leave the Kern to the Elder's port three hundred to six hundred feet. (Opinion.)

Making use of the Opinion in the absence of findings of fact, it will be seen that the decree recites certain testimony of witnesses and then sets forth (p. 55):

> "It is problematical as to just how near the Elder had approached the Kern when she blew her second whistle. The distances are variously estimated from one thousand to fifteen hundred feet to very near at hand. Arnesen says she was pretty close to them. From either point of view she kept her course until that time, that is, she was running directly with the Kern or with the Kern one-half point upon her bow, in my view, directly for the Kern. The thing which appears to be *practically certain* is that the Elder at this point put her helm hard to *starboard* and reversed her engines to full speed astern."

Nevertheless the court does not find that the Elder necessarily heard the response to her first signal, but says (p. 60):

> "But if it be that the Elder did not hear the response to her first signal it was a grave fault to approach so near to the Kern on the course she was running as to jeopardize the situation. She should either have done what she did do in the extreme or have departed from the rules and gone to starboard of the Kern."

The Elder was in charge of Captain Patterson, the pilot. There is nothing in the evidence specifically describing what a pilot is, but the evidence shows that the master of the ship was on board and no doubt the court will take cognizance of the fact that the law requires a pilot between Portland and Astoria, which law has to be complied with by the ships; that such pilot is not an employee of the ship although his fees are paid by the ship, and is under five thousand dollars bond. The pilot in this case was Captain Patterson.

It already has been pointed out that in the absence of findings and in the absence of positive statements in the Opinion of the court below as to the facts it is difficult to set forth facts as established by the decree. The Opinion indicates the doubt of the court below on several points, but nevertheless the court says that the Elder struck the Kern on her starboard quarter at an angle of about 34 degrees; that the Elder sounded her first signal to the Kern when approximately half a mile distant. The Opinion further recites that as to whether the Kern gave response to the first signal of the Elder there is a sharp conflict in the testimony.

It seems to be established, however, that the Elder signalled at approximately a half mile from the Kern. Whether or not this signal was answered is immaterial so far as the appeal of this case is concerned. The fact is, the Elder signalled, whether the first time or the second time, approx-

imately a half a mile from the Kern. Captain Moran discontinued his work on the barges, left the pilot house of the Kern and looking back saw the Elder's lights. He left the pilot house to do this. The Kern was backing and filling in the river. Captain Moran was looking out of the window forward and went to the door and looked astern to see where the whistle came from. He went out the starboard door of the pilot house, then he gave four short blasts of the whistle in answer to the whistle from the Elder. He gave those four short blasts a second or so after the whistle of the Elder. He then went outside to watch the Elder. He went "to the starboard rail on the side of the bridge." The Elder gave a second blast. Captain Moran then gave the danger signal again. After he gave the whistles he "jumped outside again to watch the Elder." He waited awhile, noticed she was swinging her head to port and he rang his vessel full speed ahead with his helm hard aport. The wheel was lashed hard aport all the time. Captain Moran did not put the wheel over to escape the accident. The libellant produced no testimony on this point.

It is further established that the Elder reversed immediately on the second whistle, which would throw her bow to port. The decree further says:

> "It is stoutly urged that the Kern was rendered in fault because Moran refused permission to the Elder to pass, under a mistaken interpretation of Rule VIII. Moran watched to ascertain whether the Elder

changed her course after signalling for permission to pass, before he acted, and, observing no change, he refused permission. He candidly concedes that his impression of the meaning of the rule was that it required the Elder to change her helm before the assent should be given. In this he was in error, for the rule requires the contrary, that is, that the overtaking vessel shall change her course upon receiving assent from the overtaken vessel—not before, but after receiving such assent.

The question is a serious one, and not free from difficulty; but I have concluded that the mistake of Moran was not the proximate contributing cause of the collision."

The court further says:

"I am satisfied that Moran did not refuse his consent to the Elder to pass arbitrarily, or with any wanton purpose of vexing her or impeding navigation. He assumed for his own safety that he ought to withhold his assent because the Elder was heading directly for his boat, upon the mistaken idea that she ought to have changed her course at once after signalling for permission to pass the Kern. The Elder, nevertheless, should have heeded the signal from the Kern, and if she had, and had acted with the same energy that she did on getting the second signal from the Kern, there would have been no collision."

To make a general statement, and omitting all question at this time as to whether or not the Elder's first signal was answered or not:—the Elder signalled to pass to starboard as she was headed, received four short blasts, slowed down, signalled again, received four short blasts and reversed at once. She signalled to pass to the

starboard of the Kern where there was plenty of room. In reversing, the bow of the Elder swung to port and caught the Kern sixteen feet forward of the steering post, the Kern at the same time throwing herself crosswise in the fairway, her wheel lashed.

With regard to the exhibits, that is, the so-called charts drawn by counsel and witnesses representing the positions of the respective craft, the situation is made clear by a statement of one of the libelant's proctors on page .. during the discussion regarding the same.

> Mr. Wood: "I will say this Mr. Denman, very frankly, all of these testimonies in cases of this kind are approximate. There are none of them mathematically exact."

As to distances, Captain Moran of the Kern says on page . . :

> "It was a dark night. It is all approximate."

Discrepancies in the evidence of the witnesses on both sides between what they said before the inspectors and what they said at the trial are found as usual in these cases.

Issues.

On the 3d day of February, 1913, (p. 28), an interlocutory decree was entered whereby the court held the Elder to be in fault and charging the Elder with all of the damages, the same to be ascertained later before a commissioner.

Thereafter testimony was taken as to the damages and on the 28th day of December, 1916, a decree was rendered against the claimant of the Elder and the surety on his bond. The claimant makes this appeal from such decree.

No findings of fact were filed by the court. An opinion was rendered by the court at the time the interlocutory decree was rendered (p. 49), from which it can be seen that the court decided certain facts. The opinion, however, does not use language of a positive character regarding many of the important facts. It holds as a matter of law that the Elder was to blame, even if the version offered by the Elder's witnesses should have been accepted.

The opinion says (p. 60):

> "But if it be that the Elder did not hear the response to her first signal it was a grave fault to approach so near to the Kern on the course she was running as to jeopardize the situation. She should have either done what she did do in the extreme or have departed from the rules and *gone to the starboard* of the Kern. In either event the collision would not have happened. This would be the case whether she knew the Kern was dead in the water or moving. The emergency was one which she ought to have been upon her guard about. She knew the Kern and the Hercules were in the habit of exchanging tows in the river and she met the Hercules almost at the very time that she sounded her first signal to the Kern and should have known that the Kern was engaged in the very thing she was trying to do at the time, namely, to pick up her tow."

It will be contended that there is no law which requires a pilot to know the habits of a vessel half a mile away in the darkness and that the pilot was bound by the signals under the regulations.

The court further says (p. 61):

> "The question is a serious one and not free from difficulty, but I have concluded that the mistake of Moran was not the proximate contributing cause of the collision. I am satisfied that Moran did not refuse his consent to the Elder to pass arbitrarily or with any *wanton purpose* of vexing her or impeding navigation."

Moran was pilot of the "Kern."

It seems therefore to the appellant that this case is as completely open for hearing in the appellate court as it was in the lower court and, as there are no questions of fact settled by the court below other than those found from the opinion, the appellate court can hear this case on the law and the admitted facts and is free to make findings on those issues of fact not settled by the court below.

An examination of the opinion shows the difficulty in reporting or representing what the findings of fact by this decree can be said to be.

An examination of the opinion shows that in the first few paragraphs the only fact established by the decree is that Cooper's Point is approximately five-eighths of a mile above the place of collision and as ships round Cooper's Point and

pick up Waterford light they bear away from the Washington shore.

The opinion points out what is claimed by the testimony of the officers of the Elder. It then "on the other hand" shows what the officers and deck hands of the Kern say.

From the testimony of the witnesses as recited, the court seems to find that (p. 54):

> "The Elder sounded her first signal to the Kern when approximately half a mile distant, and this I am constrained to believe to be the fact."

The court says it may have been nearer and may have been farther and that no implicit reliance can be placed upon the estimate of the witnesses on board the Kern as to how far distant the Elder was when she blew her first whistle.

Thereafter the opinion described what the witnesses spoke of, that the testimony of witnesses on behalf of the Kern discredits the testimony of the officers of the Elder to the effect that the Elder was running on a course having the Kern a half point upon her port bow, because if she had been the evidence should indicate that the Elder's green or starboard light would have been shut out from the Kern and as the Elder approached the angle would have increased, more perfectly obscuring her green light. The court did not cite the testimony of ..... on page .. that the green light was shut out and says, "it is prob-

lematical as to just how near the Elder had approached the Kern when she blew her second whistle." The court does make a finding (p. 55):

> "From either point of view she kept her course until that time, that is, she was running directly for the Kern or with the Kern one-half point on her bow, in my view, directly for the Kern."

The court then says (p. 55):

> "A thing which appears to be practically certain is that the Elder at this time was putting her helm hard astarboard and reversing her engines to full speed astern, which gave her a curving course to port and yet she collided with the Kern. From the expert testimony it would seem that if she had been a thousand feet distant when she began to execute the maneuver she would probably have cleared the Kern and her tow or stopped before reaching her. If within five hundred feet the results would have been problematical. Possibly even then she would have cleared the Kern."

The opinion then touches upon the conflict in the testimony and finally applies a rule of law to the effect that the witnesses on the Kern are entitled to greater credence in regard to the whistles than the witnesses on the Elder, based on a rule of law cited in the opinion.

The court then finds that the

> (p. 55) "Officers of the Elder did hear the response from the Kern and the Elder is chargeable with positive knowledge that it was given."

The opinion then proceeds to apply the rules of navigation, citing the same and the court holds (p. 58):

> "That the duty was imposed on the Elder not to attempt to pass the Kern until such time as it could be *safely* done, at which time the vessel ahead is required to signify her willingness by blowing the proper signal."

The court held:

> (p. 58) "This makes the vessel ahead a judge as to when the overtaking vessel can safely pass."

The court further held:

> (p. 58) "The Elder slowed down but kept her course, this in spite of the fact that she was steering straight for the Kern and approaching her at a rapid rate."
>
> (p. 59) "Continuing in this way the Elder again asked permission to pass."
>
> (p. 59) "The Kern again refused and then it proved too late to avoid the collision for it occurred in spite of the energetic efforts of the Kern to prevent it."

The court then proceeds to argue as to the direction that the Elder was steering after having previously found that the Elder was approaching with the Kern on her port bow or steering straight for the Kern. The opinion proceeds to discuss the question as to how the Elder really was proceeding, and proceeds to say that (p. 59):

> "It is altogether probable the Kern was pressing ahead with her helm aport."

It will be seen from uncontradicted testimony of libellant that the helm on the Kern had been lashed

hard aport, was so when the Elder first signalled. There was no finding as to who was handling the Kern except when she had to back and fill to make fast to the barges. The court thereupon finds (p. 59):

> "And the curving motion of the Elder would naturally bring her into collision at some angle."

The court here finds that the Elder came down reversing and therefore curving to port and hit the Kern, and it will be shown that if she did this she must have had the Kern on her port bow at the time the Kern gave the signal that the Elder could not pass to starboard of the Kern.

The court thereupon as a matter of law indicates that the Elder should have been mindful of her rapid approach to the Kern and should have avoided running so near as to put her in peril of a collision, in answer to which the claimant will show that this was in the Columbia River and the Elder had signalled at a proper distance to pass to the starboard and was passing to starboard and the Kern prevented it and refused permission; and further that the Kern was not "running in the same direction." The court then holds that the Elder was at liberty to break the rules and should have broken the rules in order to avoid danger.

The court further says (pp. 59-60):

> "Furthermore if she had so continued until she gave her second signal the probabilities

> are she would by that time have so indicated her course to the Kern and the latter would have signified permission to pass as requested."

The court further says (p. 60):

> "Supposedly at this time such would have been the case, counsel for respondent suggests that the response given by the Kern indicated not only that the Kern was in jeopardy but that it was not safe to the Elder to pass on either course to the starboard of the Kern or between her and the Washington shore."

The decision says, referring to Captain Moran on the Kern (p. 61):

> "He candidly concedes that his impression of the meaning of the rule was that it required the Elder to change her helm before the assent should be given. In this he was in error for the rules require the contrary, that is, that the overtaking vessel shall change her course upon receiving assent from the overtaken vessel, not before, but after receiving, such assent."

The respondent and appellant will content that this is of the greatest materiality, although the court below concludes that this mistake of Moran's is not a proximate contributing cause of the collision. The respondent and appellant believes that this error of Captain Moran's, together with the absence of the watchman and the fact that no attention was paid to navigation on the Kern at the time the Kern was being made fast to the barges, were the contributing and proximate causes of the collision, based on the fact that the Kern was not "running in the same direction;" or moving at

all in the same direction, and failed to signal that she was backing, if she claims she was moving in the same direction.

The opinion further holds that the burden of showing the fault of the collision lies on the Elder and not on the Kern.

The court below expresses its opinion as a matter of law, that the burden of proof is on the Elder, instead of on the Kern, notwithstanding the Kern's wheel was lashed, that she had no lookout, and the Captain's admission he did know that the Elder was bound to keep her course until he answered her signal, and that she was not "running in same direction."

> The court specifically holds that (p. 63):
>
> "The absence, however, of such lookout was void of any causative effect in bringing on the collision."

The appellant and claimant contends that if there had been a lookout or an officer on duty, the danger signal never would have been sounded.

The contention of the appellant is based on negligence of Captain Moran of the Kern who, intent upon handling the drifting rock scows, was using all hands, including himself, to make fast to the scows and was not giving attention to the approach of other vessels, either by a lookout or by means of a pilot or other officer: at the same time, misunderstanding and misapplying Rule VIII., thereby forcing the Elder, which was ready and trying to go to the starboard of the Kern, to

reverse, which threw the Elder's bow to port, bringing about this collision sixteen feet forward of the stern post of the Kern, which was then about crosswise of the current with its wheel lashed and drifting, and no signal to the Elder that she was not running.

The appellant contends that the fairway is for the use of all ships and although the Kern was within its rights in handling its tow in the fairway, yet this does not relieve the Kern from complying with the law and the fact that it had been customary for the Kern to exchange tows in the river could not create any custom or usage which could obviate the necessity on its part of using ordinary and usual care.

The appellant believes that it can hardly be said that the fault lay with the Elder, which did nothing but comply with the Kern's signals, whether erroneous or otherwise.

The appellant believes that the court below received and acted upon an erroneous impression of this case, resulting in a holding entirely different from what the law contemplates and what the evidence has actually brought forth.

Nor does the appellant understand the proposition of law declared in the opinion, "that it was the bounden duty of the Elder to keep out of the way of the Kern."

The appellant will contend that the Kern was not exempt from the same duty as the Elder, and

that the Elder had as much right to fear for its own safety in the immediate presence of drifting rock barges as the Kern and was compelled to notice the danger signals for its own safety and not risk a collision with a possible drifting barge between the Washington shore and the lights on the Kern,—that is to say, on the course she, the Elder, was going when she received the danger signal, and pursuant to Rule XII.

POINTS AND AUTHORITIES.

I.

At the time and before the collision the Kern was violating a statutory rule. There was no lookout.

The burden is upon her of showing that her fault could not have been a contributing cause of the collision.

The Beaver, 219 Fed. 134, 138.
7 Cyc. 370.
The Santa Clara, 21 Fed. Cas. No. 12, 327.
The Pennsylvania, 19 Wall. 125, 136.
The City of Washington, 92 U. S. 31.
The Admiral Schley, 142 Fed. 64.
The Ellis, 152 Fed. 981.

II

The Kern must show that the absence of her lookout could not have contributed to the disaster.

> "Where a vessel has committed a positive breach of a statutory duty, she must show not only that probably her fault did not contrib-

ute to the disaster, but that it could not have done so."

The Beaver, supra.

III.

The Kern with the barges was not only in the fairway, but volutarily in the ship channel. She was not there by accident or emergency with the drifting tows.

"Vessels which by some accident or emergency are compelled to anchor in the channel outside anchorage limits shall at night display two red lights in the manner prescribed above."

Rules for Barges and Canal Boats in Tow of Steam Vessels.

IV.

"When steam-vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam-whistle, as a signal of such desire, and if the vessel ahead answers with one blast, she shall put her helm to port; or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam-whistle as a signal of such desire, and if the vessel ahead answers with two blasts, shall put her helm to starboard; or if the vessel ahead does not think it safe for the vessel astern to attempt to pass at that point, she shall immediately signify the same by giving several short and rapid blasts of the steam-whistle, not less than four, and under no circumstances shall the vessel astern attempt to pass the vessel ahead

until such time as they have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals. The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel."

Rule VIII. Pilot Rules for Certain Inland Waters.

V.

"Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed."

Rule IX., Art. 21.

The Kern was on no course; her wheel was lashed; she was backing and filling.

VI.

Whereas, under the rules as written, it is argued that the Elder is an overtaking vessel, nevertheless, the Kern, with its tows is in the class described in the rules under the heading, "Warning Signals for Wrecks and Vessels Working on Wrecks or Engaged in Other Submarine Work."

It is a misconception of the rules to say that the Kern is an overtaken vessel. The rules plainly indicate that in order to apply the stringent provisions in the Rules, contained in Article 24, to-wit:

"Notwithstanding anything contained in these rules every vessel overtaking any other shall keep out of the way of the overtaken vessel,"

the conditions for which the rules were made must

The steering and sailing rules apply to vessels navigating on steady courses. A tug maneuvering tows is not an over*taken* vessel and the rule applying to an over*taking* vessel has no application. Art. 27 of the Inland Rule applies.

The John Rugge, 234 Fed. 862.

There are conditions not covered by the rules.

The Serria, 149 U. S. 144, 37 L. Ed. 681.

Another condition where the passing rule is held not to apply is found in

Transfer No. 19, 194 Fed. 77-78.

The absence of a lookout on a float while being made fast to a tug is held negligence.

The Edward G. Murray, 234 Fed. 61-62.

exist and not half or a portion of the conditions,—in short, the vessel must be overtaken to be an "overtaken" vessel, which the Kern was not. Although not anchored the Kern "was not running in the same direction." She was either stationary or backing and filling. It is the duty of the court to give due regard to "all" dangers of navigation and collision, those of the Elder as well as of the Kern.

> "In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."
>
> Rule IX, Art. 27.

VII.

> Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."
>
> Rule IX, Art. 29.

VIII.

> "A vessel *in advance* is not bound to give way or to give facilities to enable a vessel in her rear to pass her, though she is bound to refrain from any maneuvers calculated to embarrass the latter in an attempt to pass."
>
> *The Governor,* Fed. Cas. No. 5645.
>
> *The Golden Rod,* 194 Fed. 515.

ARGUMENT.

The record shows that the utmost liberality was allowed by the court below in the introduction of evidence. In fact the record shows a very considerable amount of space taken by questions and answers, either of an experimental character or with no bearing upon the issues, only serving to illustrate the now well-known fact that different people receive different impressions from the same facts and so declare themselves, and the further well-known fact of the divergence of testimony of loyal sailors in cases of collision.

Captain Moran of the Kern says he could not tell the distances. Mr. Wood, one of his proctors, indicates the same.

It is submitted that the cause should have been heard and terminated with a broader view than that covered by the testimony of one man or one set of men or a matter of a few feet.

The Rules and the Admiralty Law call for a consideration of the entire situation by the court;—the river, the fairway, the ships channel, the ships, their needs and requirements, what they were doing, what they should be doing and what they should not do, with reference to each ship and both ships, one as fully as the other.

I.

Burden of Proof.

It was Captain Moran's business and it is a necessity on the part of the libellant under the law,

the claimant contends, that the Kern should show, not only that her fault in not having a lookout did not contribute to the disaster, but that it could not have done so.

The Kern enters this cause as libelant under the burden of showing, first, that her condition in transgressing the statute and the rule did not cause the accident.

The libelant makes serious claims and serious charges. The claimant and appellant attacks the libelant's claims and position and says *"show you are right and we are wrong,"* and submits to the court that this is the law. The burden of proof is on the libelant as a matter of law. The burden of proof is not on the Elder or the claimant and appellant and never was.

It is submitted that the court below received an erroneous impression with regard to conditions that existed, and the rules.

It is submitted that the Kern, prima facie, and on libelant's own statement and admissions was at fault, first and last, in this collision. Whereas, a ship, with or without tows, has a right to the use of the fairway, there are facts and conditions which make blocking the fairway negligence. The rules indicate this and the admiralty courts recognize it.

That the rock barges were a menace cannot be and has not been contended. The Kern picked the ship channel, or rather the Hercules did, in which

to drop the tow. It should be understood that the captain of the Hercules is an employee of the libelant and his acts bind the libelant. He left the tows in the fairway. On the other hand, the Kern coming up the river left its empties clear of the fairway and safe.

The undersigned, on behalf of the appellant, offers the proposition of law that to leave these rock barges in the ship channel of the fairway on the Columbia River where there was unlimited space without the fairway, is itself gross negligence, and however much this point may be criticized or attacked or the proposition denied, nevertheless, a familiarity with the river makes this contention a positive one.

Let us take an example. Suppose similar work were being done at Marshfield and that by reason of conditions an interchange of tows would have had to be made below the city where a fill has been made, where the channel is narrow and where the Elder would occupy almost all of the channel. Or suppose the location for the change had happened to be at a point in the Columbia River where the channel is narrow, or at a bend in the Willamette, say, for instance, at Swan Island, no riverman and no one engaged in business or water transportation would say that the location of the change in itself was a matter of negligence, inasmuch as the location could not have been changed or helped. But the undoubted orders of the captains of these respective boats was to leave their respective terminae

at such a time that they could make their change at that point in the Columbia where the width of the river made the change of tows possible with safety to navigation. And it can easily be believed that these rules were broken by the captain of the Hercules in leaving the rock barges where they were left.

The appellant takes the position, as it has from the beginning of this cause, that the libelant is guilty of negligence in leaving the barges and making the change in the ships' channel where there was unlimited room to make the change without the ships' channel.

II.

The Kern was to blame for having no lookout. The reason this position is taken is that the law says there must be a lookout and until the necessity for the lookout is disposed of in the mind of the court and to the court's satisfaction, the burden, under the law, lies on the Kern.

And the appellant contends that the evidence cannot relieve the Kern for this breach of statutory duty.

The circumstances upon which the libelant relies to relieve itself of this breach of the law are so suspicious as to justify the court in adopting them as reasons for the breach of the law. Nor do the courts condone a breach of the law in a case like this where the lives of passengers are in danger.

The suspicious circumstances above mentioned are the following, to-wit: the fact that the pilot

on the Kern, in charge of the Kern, did not hear the Elder's signal to the Hercules or the Hercules' signal to the Elder, and did not know the Elder was coming and his wheel was lashed in his pilot house, and he left the pilot house to see the Elder.

It is explained to the court that if the pilot had been on duty in the pilot house he would have seen the Elder. The night was clear. But he says himself that he was busy with the scows. Neither the court nor proctors nor deckhands nor seamen can explain the lashing of the wheel except by the fact that the pilot house was empty. All of the crew and all of the officers of the Kern were engaged in making fast to the barges, excepting those officers not on watch.

Whether the Elder was passing to starboard when she signalled, which seems to be the case, or whether she was headed directly for the Kern, a half mile distant, is immaterial, if a lookout had been on the Kern, provided Captain Moran is honest in his position that he feared an accident because he could not have feared an accident when the Elder was half a mile distant from him when the first signal was sounded, if he had seen her. His only explanation of the fear of an accident could be confusion on his part.

To say that the Elder would not pass to starboard of the Kern as required by the law and as the pilot was doing, in a half a mile's distance is impossible. Why, then, did Captain Moran sound the danger signal? He sounded it on his own facts

and figures, because he had no knowledge of the Elder's position, not being in the pilot house, if he was not, or, if he was, being occupied with the barges, and on receiving the signal from the Elder blew this danger signal when he should not have done so.

Moreover the law, it is submitted, does not support the libelant. Even if the Kern were an overtaken vessel, still she could not embarrass the Elder in an attempt to pass. Whether the Kern was an overtaken vessel or some sort of a derelict or occupying the class described as "a vessel which by some accident or emergency is compelled to anchor in the channel outside anchorage limits at night" is immaterial. She really was not an overtaken vessel under the rules, because she was not running the "same direction" or in any direction, and she was not an anchored vessel and she was not a derelict, and the same applies to the scows. She presents a condition to which the general principles of admiralty will have to be applied.

Under these circumstances she is not allowed to embarrass travel on the river and the word "embarrasss" is particularly well worded in the opinion cited in the Points and Authorities.

The position has been taken by the appellant that Captain Moran, in a sort of a panic sounded the danger signal. His motives, of course, must be shown by the surrounding circumstances and his own opinions as to his motives, it is trusted, will hardly be accepted by the court. If Captain Moran

gave a danger signal when the Elder was a half a mile away or three-quarters of a mile, as he claims he did, he certainly must have thought the Elder was on top of him, and have been mistaken, or else he must have had another reason for stopping the Elder. In the event his anxiety was to make fast to the barges and his difficulty in doing so had so absorbed his attention as to make him take a chance on the river whereby he waited for nothing but blew the danger signal in panic, then we submit the libelant is to blame.

If, on the other hand, Captain Moran knew the Elder was a half or three-quarters of a mile away and knew his barges were not adrift but were fast and knew there was sixty-five feet of water between him and the Washington shore, a matter of 990 feet, and knew the Elder could easily clear him, as he did know, then what is his excuse or alleged motive for stopping the Elder? Why did he then undertake to "embarrass" the Elder in her attempt to pass? The law and particularly the admiralty law cannot fail to be aware of conditions over which it has cognizance. The testimony is clear and strong by the libelant that the wash or swell from ships disarranged the tows and let them loose.

This is a remarkable admission. To think that the Columbia Contract Company would figure so closely as to take a chance on those barges being separated when adrift by the wash from a passing steamboat or steamer and throwing the responsi-

bility of this on the captain of the towboat, would be impossible if it were not testified to and made a prominent feature. The testimony of the libelant, by Captain Moran of the Kern, and others, is that they had endeavored to have the ships and the boats slow down in passing and they never could get it done and that the barges would be washed apart by the swell of a passing steamer unless made fast in time.

It is not hard to draw a mental picture of Captain Moran on the Kern when he saw the lights of the Elder. He was not fast to the barges, he had one line out, the line was not fast, the barges were adrift, the Elder would have been at not a great distance from him in passing and Captain Moran would have had to pick up the barges, if separated or have obtained help from the Hercules for th purpose.

The motive of Captain Moran in signalling to the Elder to stop seems too clear for argument. The only trouble is that Captain Moran forgot that Patterson was in charge of a passenger vessel and that there is such a thing as danger to a passenger vessel being hit by three thousand tons of rock. Captain Patterson reversed to prevent striking a drifting barge, as Patterson undoubtedly thought. The Kern was not running in the same direction and the curve to port brought them in contact.

The case is explained by Captain Pope on page 390:

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> "If it was broad daylight and I saw my way clear through I should pass ahead, I should go through, I would exercise the right (i. e., he means break the rules), but in the night I should not attempt to go through because it is impossible for us to see very far ahead."

The appellant contends that the libelant and appellee has come into court subject to certain conditions from which it has not relieved itself; that the libelant cannot obtain a decree against the Elder until it has explained more fully than it has, and with an omission of suspicious circumstances in the testimony, the conditions to justify the breach of a statutory duty and the stopping of a passenger steamer without excuse;—that is, real excuse, excuse based on facts and conditions and not excuse fabricated and presented for purposes of argument.

As to the Evidence.

The signals came fast, Moran says, one or two seconds apart. He had to swear the signals came fast, otherwise he would be admitting there was no danger. Granted that the Elder signalled once, the Kern once, the Elder once again, the Kern once again, it will be seen that the entire performance would take about a quarter of a minute, or possibly half a minute. It is established as a fact in this cause that the Elder was about five-eighths of a mile away when she signalled, and we can put it at half a mile; the less, of course, the better for the libelant. However, a half a mile is a good distance,

and it is certainly a sufficient distance. In a half a minute then, the Elder would have gone 528 feet, at twelve miles an hour. This is not knots, this is miles. It is in the evidence that she might go 13½ miles an hour. At 12 miles an hour she would go a mile in five minutes, a half a mile in two and a half minutes, and one-tenth of a mile in a half a minute. This would be 528 feet, leaving her 2112 feet from the Kern. This can also be figured at fourteen miles if required; it also can be figured at a distance of three-quarters of a mile that she blew her whistle, but under the evidence and the findings of the court, not under a half a mile. She was then some two thousand feet from the Kern when the helm was thrown over and she reversed her engines.

However, it seems to the appellant that these matters of direction, feet, angle of impact and all such items are immaterial. The point to this case is whether the Elder was a half a mile off at least, why did the Kern try to stop her? That seemed to be the thought in Captain Patterson's mind, for he called to the officer on the bridge, "For God's sake what are those fellows trying to do?"

The excuse that Captain Moran gives is that he thought the Elder was headed for the Kern and did not know that the Elder would keep her course until receiving assent of the Kern to go to starboard.

This is his excuse for what he did. He gets out in the river with his tows adrift in the ships' chan-

nel, which is bad enough, then when he sees a boat he says "I will stop that boat because she is half a mile off and I think she looks as if she is going to hit me," notwithstanding the clear water on both sides of the Kern and the assurance from the Elder that the Kern would not be hit, for the Elder assured the Kern of this fact when she signalled that she would pass to the right.

The captain of the Kern has no right to take the law in his hands. There is an atmosphere of impeccability about the libelants' case, an assurance of superiority and proprietorship, which, of course, is based upon a successful business, but the fact that they have sold the Government this rock since 1898 and acquired a fleet of boats and a large business hardly justifies Captain Moran's excuse. He almost boastfully declares his ignorance of the law.

This assurance of Captain Moran in his testimony of his reason or excuse for stopping the Elder, was a real necessity on his part. The libelant must have an excuse for his act. There must be some pivot on which he can turn and to present an ignorance of the law as a defense or excuse for a claim under such breach, is in fact what this libelant is doing. The libelant claims damages caused by its own acts and presents as an excuse for its own acts an ignorance of the law in doing these acts.

If the libelant claims the time covered by the signals exceeded half a minute it must then (1) re-

pudiate Captain Moran's testimony, or (2) admit that he blew his alleged danger signals so that they could be interpreted as a passing signal to port.

Arthur Nissen, the witness mentioned by the Court below as disinterested, being a fisherman not drifting and who was too unemotional to offer aid to the sinking Kern with his gasoline boat, although only a short distance away, and who testified freely as to this one night, says the whistles consumed half a minute (p. 138), or else he says it was half a minute between each signal. If so, how would Captain Moran explain? Captain Moran says that he took a look and signalled without delay. There is no appreciable time consumed in making one or two steps to a door and then seeing the lights and jumping to sound the danger signal.

But if Nissen means that it was half a minute between signals, then there was no danger signal at all, only a confused sounding of signals by the Kern to pass to port—unless Captain Moran waited with danger signal, which he certainly cannot and does not admit.

Captain Moran says he sounded the danger signal a "second or so" after the Elder whistled (p. 84). He stood a few seconds until the Elder signalled the second time (p. 85). Then he gave the danger signal the second time—he jumped as quick as he could (p. 86). All of this could not have taken over half a minute, probably not a quarter of a minute. In short, Captain Moran, not knowing the

law, not knowing the rules of navigation, compelled the Elder to reverse when the Elder had a thousand feet clear in which to pass the Kern to starboard and four thousand feet to port.

The Kern was exactly in what we call on the Columbia River "the channel." She was exactly in the route taken by seagoing ships.

Captain Moran may have been in the pilot house as he says, or he may not have been. The fact that the wheel was lashed indicates rather his absence, looking after the deckhands making fast to the barges. *If Captain Moran was in the pilot house, why was the wheel lashed?* Moreover, the excuse or explanation of Captain Moran for going ahead is somewhat curious. How could he possibly hope to move three thousand tons on three barges instantly? The Kern had one slack line fast to one of the barges. The Kern was lying up and down with the river. There was a current because Moran says that when the Kern sank it went downstream.

Another claim is the one made by Captain Moran that he had to leave the pilot house to see. This is beyond belief. There is no pilot house from which the pilot or captain or mate or any one else has to go in order to see. Nor is this the case on the Kern. If so, it is negligence in navigation.

Captain Moran did not have to leave the pilot house. All this jumping about and excitement on his part at hearing a passing signal from a ship half a mile away is unbelievable. No officer of a ship leaves the wheel to jump about for a view on

a clear night. It was dark but clear on that night. They all agree on it. The Kern was either being navigated or she was not being navigated. If she was not being navigated, then her navigation had been abandoned for the time being, and the law violated by the fact that she was not in charge of an officer.

Captain Moran gives no explanation for leaving the wheel. We say leaving it, for what other conclusion is there? When the wheel is lashed there is no wheel. If he had to leave the pilot house to see the Elder then she was very far away indeed.

It will never be known what was the situation with regard to Captain Moran on that night. Captain Patterson, pilot on the Elder, says Captain Moran first sounded the signal to pass to his, the Kern's port. He may have done that and he may have sounded the danger signal later. If Captain Moran was busy, as he says he was, making fast to the barges, so busy he could not see the Elder until she signalled, he may have sounded the wrong signal the first time.

There is no captain in a pilot house navigating in the Columbia River who is so incapable as not to see the lights on a ship approaching on a clear night a mile away—to say nothing of half a mile. That is their business.

The libelant proved an unobstructed view from the Kern up-stream.

Nothing could keep the Elder from swinging to port once she began to reverse. She had a left-hand wheel. She struck the Kern on that curve. And there is nothing remarkable about it. The court below states that Captain Moran did not act as he did wantonly or maliciously or with intention of impeding navigation. But the fact remains that damages were caused, which he wishes to fasten on the Elder.

This statement, in the Opinion, carried the suggestion that Captain Moran was to blame,—but not wantonly or maliciously.

And acting as Captain Moran did, we repeat there is nothing remarkable in the Elder colliding either with the Kern or with the barges. She could not help it. The "Kern" and the barges took up a matter of three hundred feet of the fairway, depending on how they were lying.

When Captain Patterson reversed, the Elder's headway was reduced and she curved to the left. She could not help it. Neither could Captain Patterson. And the arc of the circle she was describing crossed the line covered by the Kern and the barges. Hence, the accident.

It was an accident. The collision was an accident brought about by the Columbia Contract Company and Captain Moran.

There is only one ship channel. The Hercules picked it out for Captain Moran's work and his perturbed state of mind when he saw the Elder a half to three-quarters of a mile away is evidence

that he was taking a chance and wanted no one to pass him until he had made fast.

And he wanted the Elder to stop so that the swell from her passing would not trouble him. He was not "wanton" as the court said and he was not trying to vex Captain Patterson, but he did not want his barges to drift and he did not want the swell from the Elder until he was fast to the barges. (Test. Kern, p. 437.)

Mr. Kern, one of the Columbia Contract Company's owners, so indicates. He says they often asked the boats to slow down so the Columbia Contract Co. could have the Columbia River for its uninterrupted use and seems surprised that this was not done. But Captain Moran tried to stop her, and at the same time he broke the law to do so and caused a major accident.

These conclusions appear from the testimony, —they can be seen. Captain Moran knew it was the Elder as well as Captain Patterson knew he had passed the Hercules and that the Kern was then going down with the loaded barges, which she was not.

The Columbia River is not so large that the boats thereon are not known. Captain Moran must even have recognized the Elder's whistle. He knew she was due there. He knew her schedule. He heard her whistle to the Hercules if he heard anything. He heard the Hercules whistle to the Elder. He could not have helped hearing them if he had been on duty. The Hercules blew a whistle

to pass the Elder. Nissen says so (p. 140). He says it was fifteen to twenty-five minutes before the "Elder" blew to the "Kern," which is of course mere guesswork for the Hercules left the empty barges only a short way off. This is shown by the evidence of George Hale, mate on the Hercules (pp. 232-233). He heard the Elder and the Kern. Now, why did not Captain Moran hear the Elder and the Hercules? He did if he was acting as pilot. He did not if he was acting as deckhand making fast to the barges.

If he heard the Elder signal to the Hercules he failed to state the truth in his testimony.

If he did not hear her, nothing in his testimony is worthy of belief.

He himself admits that he was "interested in the barges" (p. 113). He admits the Elder was taking her usual course (p. 114), and consequently he was blocking the fairway. Moran says the Elder was swinging to port (p. 129). He himself says the Elder was a thousand or two thousand feet distant. The court finds half a mile distant. Moran says the Elder followed the rules (p. 124), and on backing that the Elder would swing to port (until she stopped).

Captain Copeland, master of the Kern, says the Kern's engines worked for a minute before the collision. If so, then the Elder was over one thousand feet away when she began to reverse (p. 159).

Everyone agrees that the Elder was about to pass to the starboard of the Kern—between her and the Washington shore—a clear space with plenty of water for 800 to 1000 feet wide. The Elder could have gone anywhere in that space, as she intended with perfect safety. Copeland says 600 to 800 feet wide, and the Elder could go to forty feet of the bank with sixty-five feet of water (pp. 159-160).

Why, therefore, did Captain Moran want the Elder not to do this?

She was actually going that way. Moran proves it (p. 201). He says the Elder's port light was blinded before she struck, showing how much she had swung to port. And Copeland says the Kern was up and down with the stream when struck. The cut in the Kern shows how she was hit, from the quarter. Moran and Copeland first say the Kern's whistle was immediately after the Elder's.

See pages 202 and 204 as follows:

> Q. Now, as I understood you yesterday, you said the reason why you blew the four blasts was because you could not see him (185) moving over to your starboard at the time he asked for permission to go over there with the one-whistle signal; that is correct, is it not?
>
> A. That is correct; yes, sir.
>
> Q. And he had abundant time to have gone over there when he was a thousand feet away without striking you had he not?
>
> A. He had if he had a mind to do it, yes.

Q. And your theory of the case is that before he got any response from you he should have put his helm over to port and started to make that maneuver?

A. That is what I understand the law, to accompany the whistle by the alteration of your helm so as the other man can know what you are doing.

Q. And he must make that alteration of the helm before you have answered, giving him permission to come on?

A. He is supposed to accompany his whistle by the alteration of his helm.

Q. That is, before you give him a reply?

A. That is the way I understand the law.

Mr. Fulton: That understanding of the law is what you based your action on in giving the danger whistle because he didn't port his helm before you answered?

A. Yes, sir; I guess so. That is right, Senator.

Q. Now, do you recollect giving this testimony: "You must allow, 'Senator,' when he blowed his one blast I waited to see if he altered his course a second or two and then gave him four blasts when I seen that he didn't deviate a particle degree, as I could see." You recollect that testimony, don't you?

A. Yes, sir. (186)

Q. Before the United States Inspectors?

A. Yes, sir.

Mr. Campbell: What is the page?

Mr. Denman: Pardon me. That is on page 37; and what I have got next is also.

Q. And also your statement, "Then if you did wait, whatever time you waited you waited for a purpose of ascertaining whether or not he was going to change his course, didn't you? Yes."

The Witness: Yes.

Q. Then you expected him to change his course before you signified that in your judgment it was safe for him to do so, did you?

A. That was what I thought.

Q. You recollect making this statement, on page 51, "Then if you had answered his one whistle and remained where you were at, there is no question but what he would have gone by? A. Providing he had changed his course. Q. That was up to him, wasn't it? A. Yes, sir."

A. Yes.

Q. You recollect making that statement?

A. I do.

Mr. Denman: That is all, Mr. Campbell.

Captain Moran here admits the facts. He must have wanted Captain Patterson to keep his course and slow down and to make him do it he gave the danger signal. And at that the Elder was headed to pass clear to the Kern's starboard, for she had to swing to port to hit the Kern.

Captain Church, one of the libelant's witnesses and employee of the Columbia Contract Company, and Captain of the Hercules, says the Elder was three-quarters of a mile from the Kern when she first signalled (p. 218). That would be three thousand nine hundred and sixty feet. Copeland is a

good witness for the claimant and appellant. He particularly points out the danger of "lying helpless" (p. 223). He shows the danger. He shows that both he and Moran knew they were wrong in lying helpless in the fairway and blocking it, and that fear for his barges breaking loose caused Moran to signal as he did. Copeland says he himself would have let the Elder pass, certainly (p. 227). He also says there was no danger of a collision (p. 229) when the Elder sounded her whistle half a mile away.

The Kern was headed directly down stream at the time, according to Arnesen, one of her sailors (pp. 264-270). He says also it was two or three minutes from the whistle until she struck—which means he was merely answering the question in order not to refuse, because the period of a minute at such a point is an important matter.

He knows the Elder was abreast of Cooper's Point and the Kern was opposite Waterford light, which is five-eighths of a mile. But Arnesen really saw nothing, because he was taking in the slack by hand on the line to the barge. It was after the second signal he looked. Was the Elder then abreast of Cooper's Point?

Crowe, one of libelant's main witnesses, says there would have been no difficulty for the Elder to pass to starboard in half a mile. To a person living on the Willamette River and seeing ships maneuver, even between the bridges, and in a current, it is interesting to learn from Captain

Crow that the Elder might miss the Kern if she wanted to at a half a mile start. However, he does admit there would be no difficulty at all in half a mile (p. 286).

But Captain Patterson on the Elder is a state licensed river pilot of twenty-seven years' experience (p. 312) and has piloted the Elder for twenty years. She makes eleven or twelve knots at maximum, and is quick to answer her helm. He figured, not seeing the lights on the Kern, that she was pushing her tows downstream (p. 317). He figured he was handling an "overtaking" vessel. She was on his port bow. His testimony on page 319 is clear, and also it is reasonable.

The court below allowed the question as to whether or not Patterson was held at fault by the Inspectors for the collision. The court allowed the question, though it seems clearly improper on the ground stated in the objection (p. 324). And the court below was apparently largely affected by this fact. It is, however, not a just procedure for additional reasons. A pilot may be punished by the inspectors, but the one is against the pilot and this proceeding is against other parties entirely.

It is not usually considered that a finding of the inspectors can affect the credibility of the witness, as the court below says it does, on p. 324.

The court below, however, lets the finding in on the ground that it shows Captain Patterson was convicted of a crime.

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The court's position supported by libelant's counsel (p. 325) is that Captain Patterson is unworthy of belief because the inspectors disciplined him.

The court says (p. 326) that he believes it affects the credibility of the witness. The court says that is as far as it could go, viz., to affect the credibility of the witness. The decree shows that this erroneous contention of the libelant affected the court's decision.

To show the unfairness of the Patterson examination, Patterson is asked about passing Cooper's Point (p. 333). He takes a certain stand. Then he is asked if Capt. Crow stood at the mast of the wreck, could he not see a certain point up the river, and Capt. Patterson adheres to the facts which he knows from a quarter of a century's work on the river. The question was not competent. First, it should be shown that the Kern sank where she was hit and secondly that the point where she was raised was the point where she sank, when Capt. Crow did his maneuvering. In fact, the evidence shows the Kern drifted after the collision and they raised her and dropped her during the wrecking experiments, to say nothing of the fact that the current could move her and that the floats she hung by moved. But Captain Patterson explains that himself (p. 336).

Objection was made by the claimant as to the materiality of the testimony and again the court holds (p. 337) that it affects the credibility of the

witness. How the witnesses' clear and positive statement of a fact under the fire of a cross-examination can affect his credibility is not explained. But the fact remains that the credibility of a witness is attacked, *as a matter of law.*

Captain Patterson is not a witness who avoids. Captain Pattersons' testimony not only is clear but shows a particular and complete knowledge of the situation, and, what is more important, here, of the rules and regulations and the law that requires him to do certain things and refrain from doing others, of which Captain Moran freely and almost boastfully admits he knew nothing.

And after several pages of question and answer Captain Pope says (p. 389) that the Elder would have gone two or three hundred feet to port under headway with her engines reversed in a 1000 feet (p. 398); thus showing the Elder had the Kern on her port bow when she signalled, and was not headed for the Kern as Captain Moran figured.

Captain Whiteman, third mate on the Elder, testified. He was on the bridge at the time. He says the Elder was going inside of the Kern, that is, between her and the Washington shore or to her starboard (p. 401).

Claud Smith, asleep at the time, waked up, but there is no telling when he waked up with regard to the time she began reversing (p. 435).

If the Kern had been an overtaken vessel, there would have been no collision.

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Patterson should not be charged with knowledge that the Kern was not moving, viz., *was not pursuing the same direction.* All he could see were lights. Consequently Patterson cannot be charged with negligence. He had a right to figure that the Elder was really an "overtaking" vessel and that the Kern was an "overtaken" vessel. Why did not the Kern signal three whistles that she was reversing? She had been backing. The Elder had the right to believe she was overtaking the Kern. If so, the Kern would have been out of the Elder's way long before the Elder could reach her. If the Kern had been *"running in the same direction"* the Elder could not have reached her; the Elder would have been a quarter of a mile behind her at the time and place of the collision.

Respectfully submitted,

SANDERSON REED,
Proctor for Appellant.

Portland, Oregon,
December 30, 1917.